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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-[illegible]50

HERMAN TANN, DAVID TANN, GEORGE TANN, LEE TANN, ALBERT TANNER and EDNA CHOSID, co-partners d/b/a THE TANN COMPANY, a co-partnership, and THE TANN COMPANY, a Michigan corporation,

Petitioners,

v.

GEORGE H. HUMPHREYS, Administrator of the Estate of John S. Humphreys, deceased, and GEORGE H. HUMPHREYS, individually,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioners* Herman Tann, David Tann, George Tann, Lee Tann, Albert Tanner and Edna Chosid, co-partners doing business as The Tann Company, a co-partnership, and The Tann Company, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on November 21, 1973.

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* Petitioners are collectively referred to herein as "petitioner Tann Company" or "Tann."

Opinions Below

The opinion of the Court of Appeals reported at 487 F.2d 666 (6th Cir. 1973) appears in Appendix B hereto. The opinion of the United States District Court for the Southern District of Ohio (Western Division), reported as *In re Air Crash Disaster Near Dayton, Ohio*, 350 F. Supp. 757 (S.D. Ohio 1972), appears in Exhibit B hereto.

Jurisdiction

The judgment of the Court of Appeals for the Sixth Circuit was entered on November 21, 1973. This petition for certiorari was filed within ninety days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

Questions Presented

1. Whether a transferee District Court in multidistrict litigation involving multiple wrongful death actions arising out of a single aviation disaster occurring in the airspace over a particular state should apply federal or state rules of collateral estoppel to issues determined during the litigation of said actions?

2. Whether the plaintiff—personal representative of a deceased passenger who died as a result of a multidistrict aviation accident can be collaterally estopped from relitigating the negligence of a defendant which was decided in favor of that defendant by a jury in a prior trial to which said plaintiff was not a named party, when said plaintiff actively participated in consolidated pre-trial discovery and the formulation of the issues to be initially tried; would have benefited from an adverse judgment against said defendant at the prior trial; does not contend that the

prior trial was litigated improperly or incompetently, and proffers no new evidence or additional issues in support of his request for another trial against said exonerated defendant?

Statutes Involved

The statutory provisions involved are in Title 28, United States Code, § 1407, which is printed in Appendix A, *infra*.

Statement of the Case

This is one of three actions[1] brought to recover for the wrongful death of John S. Humphreys, who was a passenger aboard a Trans World Airlines (TWA) DC-9 aircraft when it collided in mid-air with a Beech Baron aircraft owned by petitioner Tann Company (a Michigan copartnership) near Urbana, Ohio, on March 9, 1967. Plaintiff-respondent George H. Humphreys is the duly appointed administrator of the estate of John S. Humphreys.

Respondent commenced the instant action on or about February 25, 1969 (approximately two weeks before the statute of limitations was to run) in the United States District Court for the Eastern District of Michigan (A. 160-165).* Respondent's action was one of many death

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[1] This was the third separate lawsuit commenced by respondent to recover for John Humphreys' death. The first suit was commenced against TWA in the Supreme Court of the State of New York, County of New York, on or about July 18, 1968, and was settled by TWA for $485,000. The second suit was commenced against the Government in the United States District Court for the Southern District of New York on or about July 14, 1969, and was settled by the Government for $10,000.

* "A" references are to the Appendix filed in the Court of Appeals. A certified copy thereof has been filed in this Court.

actions arising out of this accident which had been commenced in federal courts throughout the country.

On March 23, 1970, the Judicial Panel on Multidistrict Litigation assumed jurisdiction over the litigation arising out of this accident and transferred all actions, pursuant to 28 U.S.C.A. § 1407, to the United States District Court for the Southern District of Ohio (Western Division) and assigned them to Chief Judge Carl A. Weinman for consolidated and coordinated pre-trial proceedings. *In re Air Crash Disaster Near Dayton, Ohio,* 310 F. Supp. 798 (JPML 1970). Although not in the original group of cases transferred by the Judicial Panel, respondent's case was transferred by the issuance of a tag-along order on July 3, 1970.[2]

All suits naming Tann as a defendant, including respondent's, essentially alleged that its negligence in the ownership, operation, maintenance and control of the Beech Baron was a proximate cause of the collision.

On July 15, 1970, a pre-trial conference involving all of the consolidated actions was held before Judge Weinman in Dayton, Ohio. Counsel for both parties to this action were present at and actively participated in said conference. As a result of the conference, *inter alia,* the parties agreed and the Court subsequently ordered that all discovery proceedings would be applicable to, and binding upon, all parties to the consolidated actions (A. 43-48, 55-59, 82), and that the plaintiffs would formulate specific allegations of negligence against each of the defendants upon which they would rely at the time of trial (A. 46). It was expressly understood and agreed that all future discovery, by way of deposition or otherwise, would be applicable to all parties to the consolidated actions (A. 55-59). The Court also ordered that all plaintiffs and defendants cooperate and communicate among themselves

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[2] Rule 12, Rules of the Judicial Panel on Multidistrict Litigation.

to achieve stipulations of material facts in the litigation (A. 61-62, 84).

After this conference, joint pre-trial discovery proceedings were undertaken and completed by all counsel. Counsel for respondent admittedly "fully participated" in these discovery proceedings (Respondent's Brief in the Court of Appeals, p. 2). After the completion of said discovery, all parties were expressly advised by order of the District Court dated November 4, 1970, that a pre-trial conference would be held in all actions on December 15, 1970, for the purposes of settlement discussions, the resolution of all remaining pre-trial matters and trial preparation (A. 87-88). In its order, the District Court proposed that the plaintiffs should be prepared to advise it of all facts they expected to prove in support of their allegations of negligence against all defendants, including Tann. All pending motions were to be resolved and all damage information was to be supplied by all plaintiffs to the defendants (A. 88).

At the December 15, 1970, conference, Craig Spangenburg, Esq., counsel for plaintiff Downey spoke ". . . for Downey and all those similarly situated as passengers in the TWA flight approaching Dayton to land" (A. 92) and recited the acts which all plaintiffs claimed constituted actionable negligence on the part of petitioner Tann (A. 92-94). All of plaintiffs' counsel at the conference concurred in Mr. Spangenburg's allegations against Tann (A. 94). While counsel for respondent herein was physically absent from said pre-trial conference, he was given ample notice of its schedule and agenda (A. 87-88), and to date he has never presented any additional allegations of fault on the part of Tann or allegations of negligence that were different from those alleged by Mr. Spangenburg on December 15, 1970, and subsequently litigated in the *Downey* trial. Thus, in all passenger actions, including the instant action, the issues of negligence and the opera-

tive facts pertaining thereto with respect to petitioner Tann were identical.

On March 22, 1971, the trial of the case of *Downey* v. *Trans World Airlines and Tann Company* commenced in the District Court in Dayton, Ohio. (A transcript thereof was part of the record on appeal in the Court below.) The *Downey* action was chosen to be tried, without objection from any plaintiffs, because it was the only case in which more than one defendant was directly sued by a plaintiff and was an appropriate case for determining whether the deaths of the passengers were the result of the joint negligence of two defendants or the sole negligence of one of them. In short, it was the action which would be most effective in establishing liability and the most influential in ultimately disposing of all litigation arising out of this accident.

On April 7, 1971, after three full weeks of trial before Judge Weinman and after all aspects of Tann's alleged negligence had been put in issue by both the plaintiff and TWA, the jury in the *Downey* action returned a general verdict in favor of plaintiff against Trans World Airlines, Inc., and in favor of Tann against plaintiff. Judgment was so entered on April 8, 1971 (A. 42). No appeal was taken by either TWA or the plaintiff therein, and the judgment was ultimately satisfied by TWA.

After the *Downey* judgment, Tann moved on September 21, 1971, for summary judgment in all outstanding passenger actions against it on the grounds that these plaintiffs should be collaterally estopped from relitigating the question of Tann's negligence because their causes of action were identical, they had jointly and actively participated in all pre-trial proceedings and in formulating the issues tried in the *Downey* action, they were united in their interest in the outcome of *Downey* and all issues of negligence against Tann had been fairly, fully and competently tried to a jury and adjudicated in favor of Tann (A. 36-39).

At the time that this motion came on for argument before Judge Weinman on May 3, 1972 (A. 139-159), *Humphreys* was one of two remaining passenger federal court actions pending against Tann. The other plaintiff offered no opposition to Tann's motion. On September 29, 1972, the United States District Court for the Southern District of Ohio, Western Division, Weinman, J., handed down a memorandum opinion and order (Appendix B, pp. 27-49, *infra*) granting Tann's motion for summary judgment, wherein it was determined that federal rules of collateral estoppel applied to the issue, and under said rules plaintiff-respondent Humphreys was collaterally estopped from proving negligence against Tann because the interests of respondent herein were identical to those litigated in the *Downey* trial, and those interests had been vigorously and competently represented in the prior trial. *In re Air Crash Disaster Near Dayton, Ohio*, 350 F. Supp. 757 (S.D. Ohio 1972). Judgment in favor of Tann herein was entered on September 29, 1972 (A. 35).

On or about October 27, 1972, respondent filed a notice of appeal to the United States Court of Appeals for the Sixth Circuit, and, after entry of a conditional dismissal order for failure to prosecute, respondent perfected his appeal on or about May 12, 1973. The issues were submitted by stipulation to the Court of Appeals, without oral argument, on or about October 2, 1973.

On November 21, 1973, the United States Court of Appeals for the Sixth Circuit rendered its opinion (Appendix B, pp. 50-60, *infra*) reversing the decision below on the ground that under either Federal or Ohio law the respondent could not be collaterally estopped without having an opportunity to try his case.

REASONS FOR GRANTING THE WRIT

1. The determination of the preclusive effect of a District Court judgment rendered in a multidistrict litigation action on other federal court proceedings arising out of the same mass disaster is an important question of federal law, the resolution of which will facilitate the judicial administration of such proceedings.

The instant petition for certiorari requests this Court to review the correctness of a thoughtful and enlightened effort by one District Court judge to meet the burgeoning case docket overwhelming the federal court system in a manner that is reasonable and fair to *all* litigants. While the petition herein is set within the context of multidistrict litigation, a review of this case on the merits would permit the Supreme Court to promulgate the ultimate federal rule to guide the lower courts in the application of collateral estoppel. In short, this case presents for resolution all of the important issues left open by the Court's decision in *Blonder-Tongue Laboratories, Inc.* v. *University of Illinois Foundation,* 402 U. S. 313, 91 S. Ct. 1434, 28 L. Ed. 2d 788 (1971).

In *Blonder-Tongue, supra,* the Supreme Court upheld in the context of patent litigation the plea of estoppel by one charged with infringement of a patent that had been declared invalid in a prior litigation. In reaching this result, the Court specifically held that mutuality of estoppel was no longer necessary to invoke the doctrine. However, since the patentee in *Blonder-Tongue, supra,* had had a prior opportunity to fully litigate the issue of patent validity, the use of estoppel was defensive in nature and the question of estopping a party who had not previously tried his case was not at issue. In fact, Mr. Justice White commented:

> ". . . the case before us involves neither due process nor 'offensive use' questions." 402 U. S. at 330.

The instant petition presents to this Court a case that does involve the offensive use of collateral estoppel in a due process context.

In reaching its decision herein, the District Court met head on the issue of whether or not federal or state law governed the collateral estoppel effect of the prior federal judgment, and determined that the issue should be governed by federal law. The District Court also concluded:

> "This Court does not believe that the maxim that each man must be given his day in court is so inexorably fixed that it must mandatorily apply where a careful evaluation of the record of pretrial and trial proceedings in the prior action discloses that the absent party was given full and complete opportunity to ascertain and develop all relevant facts and to frame the issues during discovery and the liability issue was adjudicated at a trial conducted in an atmosphere free from errors in substantive, evidentiary and procedural law or trial strategy which if avoided would have changed the result.
>
> In the limited context of these multidistrict litigation cases the Court does not believe the principles of fundamental fairness guaranteed by due process of law are violated by the application of the doctrine of collateral estoppel against plaintiff Humphreys." (Appendix B, p. 45, *infra*)

Upon review the Court of Appeals for the Sixth Circuit found it unnecessary to determine the choice-of-law issue since, in its opinion, under either federal or state law the concept of due process embodied in the "classic test of preclusion" prevented estoppel of the respondent Humphreys because:

> "While the doctrine of collateral estoppel permits a prior judgment to preclude litigation of an issue previously determined on its merits, it may be applied *in favor of* a stranger to the first action, but only

against a party to that action." (Appendix B, p. 59, *infra*)

Petitioner would submit, however, that this "classic test of preclusion," first laid down in *Bernhard* v. *Bank of America,* 19 Cal. 2d 807, 122 P. 2d 892 (1942), is now over thirty years old, and its appropriateness in the context of modern multidistrict litigation and due process concepts deserves to be re-examined.

The instant petition offers an ideal opportunity for such a re-examination since it presents squarely the question of what actions federal courts may constitutionally take to minimize the litigation of multiple lawsuits involving identical issues of fact. Since such litigation usually involves either federally created causes of action or multi-state activities, the federal courts are being increasingly called upon to resolve such disputes. In 1968, Congress recognized this development and took a first step toward the efficient resolution of such litigation by adopting the Multidistrict Litigation Act, 28 U.S.C. § 1407 (Appendix A, p. 24, *infra*), providing for the consolidation for pre-trial proceedings in one federal District Court of multiple actions posing common questions of law and fact.

The instant action is a typical example of the strengths and weaknesses of the Multidistrict Litigation Act. Respondent's decedent herein was a passenger aboard a TWA DC-9 which collided with petitioner's aircraft. As such, the facts pertaining to respondent's claim of negligence on the part of TWA and petitioner were identical to those involved in the claims of every other passenger aboard the TWA aircraft. For this reason respondent's action was consolidated for pre-trial proceedings with other passenger actions in the United States District Court for the Southern District of Ohio. *In re Air Crash Disaster Near Dayton, Ohio,* 310 F. Supp. 798 (JPML 1970). These proceedings were completed and the salutary effects of the

Act were reflected by the savings in time and expense inherent in such consolidation. The *Downey* action was then vigorously and thoroughly tried, and petitioner was exonerated. At that point, however, the Multidistrict Litigation Act ceased to operate, for it left unanswered the most important question arising in this type of litigation—i.e., was there any reason in law or logic to re-try the same issues?

The District Courts have logically supplied the answer to this question in those situations where a defendant has been held liable in the first trial by collaterally estopping him from denying his negligence in subsequent trials. *United States* v. *United Air Lines*, 216 F. Supp. 709 (D. Nev. 1962), aff'd *sub nom. United States Air Lines* v. *Wiener*, 335 F. 2d 379 (9th Cir. 1964), cert. den. 379 U. S. 951, 85 S. Ct. 452, 13 L. Ed. 2d 549 (1964); *State of Maryland* v. *Capital Airlines, Inc.*, 267 F. Supp. 298 (D. Md. 1967). However, this still leaves unanswered the procedure to follow where the first trial exonerates the defendant.

No satisfactory answer has yet been found to this quandary. The District Courts, however, are acutely aware of the problem and in another mid-air collision accident Judge Pierson Hall resolved the issue by declaring a class action for the determination of liability. *Petition of Gabel*, 350 F. Supp. 624 (C.D. Calif. 1972). In so doing, one of the reasons stated by Judge Hall was:

> "Adjudications exonerating any one of the defendants would as a practical matter certainly impair or impede the ability of the other plaintiffs to recover against the defendant who might be exonerated. In fact if the doctrine of *res judicata* were strictly applied in such an instance, it would not only impede or impair that ability, but deny it entirely." 350 F. Supp. at 630.

Nevertheless, there are clear differences of opinion as to the advisability of subjecting mass disaster litigation to class action determination. In drafting Rule 23, the Advisory Committee noted:

> "A 'mass accident' resulting in injuries to numerous persons is ordinarily not appropriate for a class action because of the likelihood that significant questions, not only of damages but of liability and defenses to liability, would be present, affecting the individuals in different ways. In these circumstances an action conducted nominally as a class action would degenerate in practice into multiple lawsuits separately tried." 39 F.R.D. 69, 103.

And in *Hobbs* v. *Northeast Airlines, Inc.*, 50 F.R.D. 76 (E.D. Pa. 1970), Judge John P. Fullam refused to declare a class action in an aviation accident because he did not think it appropriate in mass disaster litigation. It is thus clear that the lower federal courts are in a dilemma on exactly how to set up mass tort litigation so that the judicial machinery can dispose of the issues as expeditiously as possible.

Certainly, on its face the solution arrived at by Judge Carl A. Weinman in the instant action was logical and reasonable. First, an adverse judgment against Tann would have prevented it from further litigating the issue (Appendix B, p. 44, *infra*). Secondly, by use of collateral estoppel the problems referred to by the Advisory Committee that are inherent in the declaration of a class action are avoided since the trial court does not have to make a premature and possibly erroneous prediction that identical issues are involved in all of the actions. The trial court may postpone this determination until after the completion of consolidated discovery proceedings and the trial of one case, by which time the issues and facts will have sufficiently crystallized so that a rational decision can be ar-

rived at as to whether the issues in subsequent cases are identical to those tried in the first action and therefore justify the use of collateral estoppel. This approach to the application of collateral estoppel combines the opportunity to minimize repetitive litigation with the mechanism most likely to preserve the rights of those whose cases involve truly different issues than those litigated in the first case. Under such an approach, in the case of two plaintiffs with identical claims, the real issue then becomes whether the interests of the second claimant have been adequately and fairly represented in the first trial, and, if they have, a second trial would be a fruitless endeavor and justify the use of collateral estoppel. *Cauefield* v. *Fidelity & Casualty Company of New York,* 378 F. 2d 876 (5th Cir. 1967), cert. den. 389 U. S. 1009, 88 S. Ct. 571, 19 L. Ed. 2d 606 (1967).

The Sixth Circuit rejected such an approach in the instant action apparently in the belief that it was faced with an insurmountable due process obstacle in that the respondent Humphreys had not had his day in court. Of course, the respondent Humphreys did have his day in court in the sense that he recovered $485,000 from TWA and $10,000 from the United States of America for his decedent's wrongful death. But, in spite of these recoveries, and in spite of his active participation in the discovery process herein and the framing of the issues, Humphreys could complacently sit back and await the outcome of the *Downey* trial. If Tann lost, he could move for summary judgment and estop Tann from relitigating its negligence. If Tann won, he could claim his constitutional right to his "day in court" and force Tann and the federal judiciary to retry a three-week case which no one claims was improperly tried in the first instance.[3] As Professor

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[3] Tann is in the precise situation foreseen by Professor Currie in his classic hypothetical in which a railroad faced with fifty passenger suits, could successfully defend twenty-five, lose the twenty-

(footnote continued on following page)

Semmel stated in his article *Collateral Estoppel, Mutuality and Joinder of Parties:*

> ". . . in certain instances the element of fairness seems clear in not allowing the potential litigant to sit on the sidelines in the first action knowing he can reap the fruits of victory without taking the consequences of defeat." 68 Col. L. Rev. 1457 (1968).

Petitioner submits that the decision by the Court of Appeals herein fails to properly apply the doctrine of collateral estoppel to modern due process concepts and the particular factual situation herein. As Professor Vestal analyzed the situation as far back as 1964:

> "The key to preclusion now is not that certain parties have litigated, but rather that an issue has been adjudicated. The emphasis is not on the concept of identity of parties in the first and second suits. Rather, the shift has been to the practical situation involved. Has the litigant in Suit II been represented in the first suit so that it is reasonable and constitutionally permissible to hold him precluded? If he was a party, the assumption is that issues decided are precluded as far as he is concerned. The only possible exception is the non-adverse party situation. If the supposedly precluded party in Suit II was not a party in Suit I, then the question may be cast in terms of whether he was adequately represented—whether there was incentive and opportunity for someone adequately to litigate the question under consideration—in Suit I. These, of course, are limitations which inhere in the Constitution.

(footnote continued from preceding page)

sixth, and then be barred from defending the remaining twenty-four. Even though it is self-evident that such a result is indefensible, the law in its present state appears to allow such a result. Currie, *Mutuality of Collateral Estoppel: Limits of the Bernhard Doctrine*, 9 Stan. L. Rev. 281 (1957).

> What apparently is happening is that the courts, pushed by the press of work and general reluctance to waste the time of the judiciary, are extending the concept of preclusion to its logical limits and that these limits are articulated in terms of (1) that which is justified rationally by the litigation in Suit I; what issues were decided and by what individuals representing what general groups of prospective litigants and (2) the constitutional due process clause, *which is really only a limitation in terms of what is reasonable.* These would seem to be the ultimate lines within which preclusion will develop." (Emphasis added.) Vestal, *Preclusion/Res Judicata Variables: Parties,* 50 Iowa L. Rev. 27, 76 (1964).

If the approach advocated by Professor Vestal were to be adopted, the issue in mass tort litigation would be whether the first trial was properly presented by plaintiff's counsel, and, if it was, and no new evidence or additional issues could be offered, then the result of the first trial would collaterally estop all other claimants similarly situated and preclude a second trial on the merits. Indeed, Mr. Justice White recognized the validity of this approach in *Blonder-Tongue, supra,* when he stated:

> ". . . Arguably, however, the availability of estoppel . . . will merely shift the focus of litigation from the merits of the dispute to the question whether the party to be estopped had a full and fair opportunity to litigate his claim in the first action. * * * It would seem sufficient answer to note that once it is determined that the issue in both actions was identical, it will be easier to decide whether there was a full opportunity to determine that issue in the first action than it would be to relitigate completely the question . . ." 402 U.S. at 347.

Based upon the foregoing, it appears clear that the present case presents this Court with a unique opportunity

to state definite rules with respect to the use of collateral estoppel in the federal courts and in particular how the doctrine should be used in the resolution of multidistrict litigation.

2. There is a conflict of opinion among the Circuit Courts of Appeal with respect to whether the collateral estoppel effect of a prior federal court judgment is governed by federal or state law in diversity cases and what the constitutional boundaries are for the offensive use of the doctrine.

It would appear from the opinion below that the Court of Appeals believed that the collateral estoppel effect of the prior judgment was governed by state law rather than federal law and mutuality of parties was still a viable prerequisite for the application of the doctrine, at least, if the doctrine was to be used offensively.[4]

Although many Circuit Courts have considered the question of collateral estoppel in pure diversity actions to be "substantive" and therefore governed by state law,[5] there is a growing awareness that perhaps this too long unquestioned tenet is no longer valid. Thus, in *Kern* v. *Hettinger*, 303 F. 2d 333 (2d Cir. 1962), the Court, in holding that a federal judgment entered in a California libel action precluded a second action commenced in New York, stated:

> ". . . It would be destructive of the basic principles of the Federal Rules of Civil Procedure to say that the

[4] If in fact federal law was being applied, then the Sixth Circuit misinterpreted this Court's opinion in *Blonder-Tongue, supra*, which abrogated the doctrine of mutuality in actions based upon federally created rights.

[5] *Breeland* v. *Security Insurance Co.*, 421 F. 2d 918 (5th Cir. 1969); *Priest* v. *American Smelting & Refining Co.*, 409 F. 2d 1229 (9th Cir. 1969); *Graves* v. *Associated Transport, Inc.*, 344 F. 2d 894 (4th Cir. 1965); cf. *Lynne Carol Fashions, Inc.* v. *Cranston Print Works Co.*, 453 F. 2d 1177 (3rd Cir. 1972).

> effect of a judgment of a federal court was governed by the law of the state where the court sits simply because the source of federal jurisdiction is diversity. * * * The *Erie* doctrine . . . is not applicable here; . . ." 303 F. 2d at 340.

Indeed, since collateral estoppel is "an important principle of judicial administration" and where "the courts involved are both federal . . ., it is logical to say that the relationship between the two should be governed by federal law." Vestal, *Federal Res Judicata/Preclusion,* 66 Mich. L. Rev. 1723, 1746 (1968). And where federally created rights are involved, even though jurisdiction is based upon diversity, the federal law of collateral estoppel will apply.[6] *Partmar Corp.* v. *Paramount Corp.*, 347 U.S. 89, 92, 74 S. Ct. 414, 98 L. Ed. 532 (1954).

Assuming, then, the application of the federal law of collateral estoppel, the Circuit Courts are by no means uniform in their interpretation of the constitutional limits of the use of the doctrine. Thus, in the instant case, the Sixth Circuit did not believe that the doctrine could constitutionally be used offensively. However, both the Fifth Circuit and the Third Circuit disagree with such a limited approach to the issue and have applied collateral estoppel offensively to prevent a non-party from relitigating an identical issue that was fully and fairly litigated in a prior action.

Thus, in *Cauefield* v. *Fidelity & Casualty Company of New York*, 378 F. 2d 876 (1967), cert. den. 389 U.S. 1009, 88 St. Ct.

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[6] Although the complaint herein alleges jurisdiction based upon diversity of citizenship, recent case development has held that a federally created cause of action for wrongful death exists as a result of a fatal mid-air collision. *Gabel* v. *Hughes Air Corp.*, 350 F. Supp. 612 (C.D. Calif. 1972). It should also be noted that under 49 U.S.C.A. § 1508(a) the United States of America is declared to possess and exercise complete and exclusive sovereignty in the airspace of this country. The collision herein occurred in national airspace and one of the aircraft involved was on an instrument flight plan receiving radar vectors from Government air traffic controllers.

571, 19 L. Ed. 2d 606 (1967), the Court of Appeals for the Fifth Circuit held that where one member of a group litigated the issue and failed to obtain a judgment in his favor, then other members of the group who sought to relitigate the same identical claims were barred by collateral estoppel. In the Court's opinion, such a result—

> ". . . will prevent fruitless relitigation of an issue which already has been judicially determined." 378 F. 2d at 879.

It is clear from the opinion in *Cauefield* that evidence to be offered in the second trial was the same as that offered in the first trial[7] and that there had been a full and fair hearing on the issue.[8] See *Friedenthal* v. *Williams*, 271 F. Supp. 524 (E.D. La. 1967), aff'd *sub. nom. Friedenthal* v. *General Insurance Co. of America*, 395 F. 2d 202 (5th Cir. 1968).

Likewise, in *Antonioli* v. *Lehigh Coal & Navigation Co.*, 451 F. 2d 1171 (3rd Cir. 1971), cert. den. 406 U. S. 906, 92 S. Ct. 1608, 31 L. Ed. 2d 816 (1972), which involved a labor dispute, parties to the second action who had not been parties to the prior action were barred from relitigating identical issues. The Sixth Circuit attempted to distinguish *Antonioli, supra*, on the ground that there was substantial identity of parties in the two actions and that they complained of substantially the same wrong.[9] But isn't there a

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[7] In the instant action respondent Humphreys has never claimed that the evidence he intended to offer at trial would be different or that different acts of negligence would be argued.

[8] The Sixth Circuit attempted to distinguish *Cauefield* on the ground that it represented an unusual application of Louisiana law. However, since there was no Louisiana law in point, the decision is clearly the Fifth Circuit's own judgment on how such an issue should be resolved, and reflects the "full and fair opportunity test." See *De Witt* v. *Hall*, 19 N.Y. 2d 141, 225 N.E. 2d 195 (1967); *Zdanok* v. *Glidden Co.*, 327 F. 2d 944 (2d Cir. 1964).

[9] Footnote 22 of the *Antonioli opinion* (451 F. 2d at 1177) makes it clear, however, that the named parties were different.

substantial identity of parties between *Downey* and *Humphreys* (i.e., both deceased passengers killed in the same accident), and aren't they complaining of the exact same wrong (i.e., the alleged wrongful death of their decedents as a result of the negligence of Tann)? As the respondent's attorney admitted in his own article, *Collateral Estoppel and Other Practical Approaches to Commercial Air Crash Claims:*

> "Insofar as liability is concerned every passenger is nominally in the same legal position as his fellow." 13 N. Y. Law Forum 509, 513 (1967).

Petitioner submits that in both *Cauefield* and *Antonioli, supra,* the "category" of plaintiff was the same in each action and therefore it was proper to estop the plaintiff in the second suit, whether this result be articulated in terms of an expanded concept of privity[10] or on the basis that due process had been satisfied because there was a full and fair opportunity to litigate the identical issue in the first lawsuit and therefore it was reasonable to deny the plaintiff his day in court in the second lawsuit.[11]

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[10] *United States* v. *Kabinto,* 456 F. 2d 1087 (9th Cir. 1972), Note, 26 Rutgers L. Rev. 909 (1973); *Nemeth* v. *Aluminum Cooking Utensil Co.,* 146 Cal. App. 2d 405, 304 P. 2d 129 (1956); *Ramos* v. *Horton,* 456 S.W. 2d 565 (Tex. Civ. App. 1970).

[11] In *Burns* v. *Unemployment Compensation Board of Review,* 164 Pa. Super. 470, 65 A. 2d 445 (1949), a group of plaintiffs with identical claims allowed one member to bring an initial lawsuit. After the first trial resulted in a finding for the defendant, another plaintiff brought an action for the identical relief. The Pennsylvania court dismissed the second action, holding that the plaintiff therein was collaterally estopped because:

> "All of the matters sought to be litigated here were litigated in the [first] case, and the decision and judgment in that case preclude appellant, even though he be considered not to have been a party to that proceeding, from again litigating the question." 164 Pa. Super. at 471.

See Semmel, *Collateral Estoppel, Mutuality and Joinder of Parties,* 68 Col. L. Rev. 1457 (1968); Vestal, *Preclusion/Res Judicata Variables: Parties,* 50 Iowa L. Rev. 27, 76 (1964).

This latter reasoning was the approach taken by the Colorado Court of Appeals in *Waitkus* v. *Pomeroy*, 31 Colo. App. 396, 506 P. 2d 392 (1972). In *Waitkus* the defendant Pomeroy was racing his automobile against the defendant Vesey when his car left the road, injuring his passengers Zeiler and Waitkus. Zeiler sued Pomeroy and Vesey and recovered against Pomeroy only, with Vesey obtaining a directed verdict in his favor. The judgments were affirmed on appeal. Waitkus then sued Pomeroy, Vesey and Vesey's father who was the owner of the automobile. The trial court initially granted Waitkus summary judgment against Pomeroy on the basis of collateral estoppel and granted the Veseys summary judgment against Waitkus. A jury trial on damages resulted in a $100,000 verdict against Pomeroy. After trial, Pomeroy moved for a new trial claiming error in the granting of the two summary judgment motions and that the verdict was excessive. The trial court granted the motion and ordered a new trial without stating any reasons therefor. At the second trial, summary judgment motions by Waitkus and the Veseys were denied, and the jury rendered a verdict against Pomeroy and the Veseys for $33,000. The plaintiff then appealed. The Veseys did not appeal.

On appeal, the Court of Appeals held that the trial court was not only correct in granting Waitkus summary judgment on the basis of collateral estoppel against Pomeroy, but also correct in granting the Veseys summary judgment against Waitkus on the ground of collateral estoppel. In reviewing the correctness of the latter point, the Court of Appeals acknowledged that the test to be applied was that advanced by Mr. Justice Traynor in *Bernhard* v. *Bank of America*, 19 Cal. 2d 807, 122 P. 2d 892 (1942), and supplemented by him in *Teitelbaum Furs, Inc.* v. *Dominion Insurance Co.*, 58 Cal. 2d 601, 375 P. 2d 439 (1962), i.e.:

> [1] Was the issue decided in the prior adjudication identical with the one presented in the action in

> question? [2] Was there a final judgment on the merits? [3] Was the party against whom the plea is asserted a party or in privity with a party to the prior adjudication? [4] Was the issue in the first case competently, fully, and fairly litigated? 506 P. 2d at 395.

The Colorado Court of Appeals applied the above-cited four tests to the case at hand and concluded that the issues in both lawsuits were identical and that there was no unfairness or lack of a full opportunity to litigate in the first lawsuit. However, the issue that caused the Court the greatest concern was the fact that Waitkus was not a party in the first lawsuit and that the application of collateral estoppel would deny him his "day in court" against the Veseys and thereby deny him due process of law. In disposing of this point, the Court reviewed analogous cases, including *Cauefield* v. *Fidelity & Casualty Co., supra,* and concluded:

> "In the present case, a careful examination of the facts discloses that the interest of the previous plaintiff, Zeiler, and the present plaintiff, Waitkus, are identical as far as the liability of Vesey is concerned. Both Zeiler and Waitkus were passengers in the automobile driven by Pomeroy. Defendants Veseys' liability, if any, to either passenger in the car is exactly the same even though the amount of damages differed. Except for the additional assertion of the family purpose doctrine in the present case, the pleadings in both cases assert the same claims and defenses.
>
> The application of the doctrine of res judicata rests 'upon the sound public policy of limiting litigation by preventing a party who has had one fair trial on an issue from again drawing it into controversy. . . . The doctrine also serves to protect persons from being twice vexed for the same cause.' *Bernhard, supra.*
>
> In giving purpose and meaning to this rationale, we hold the doctrine of collateral estoppel, as we have

described it above, is applicable in a situation where, although the parties were not identical, their interests were identical. We conclude that the trial court did not err in determining that the tests enunciated in *Bernhard* and *Teitelbaum, supra,* had been met in initially granting summary judgment to defendants Vesey." 506 P. 2d at 397-398.

Although the Court of Appeals concluded that the initial summary judgment against Pomeroy was correct, it reversed for a new damage trial against Pomeroy since the decision setting aside the original verdict did not indicate whether the trial judge considered the verdict excessive.

Pomeroy then petitioned to the Supreme Court of Colorado on the "sole issue" of whether the doctrine of collateral estoppel could be applied against him as a result of the *Zeiler* judgment. The Supreme Court concluded it could not because certain affirmative defenses pleaded in the *Waitkus* action, i.e., contributory negligence and assumption of risk, had not been litigated in the *Zeiler* action. The Supreme Court therefore reversed and reinstated the jury verdict against Pomeroy and the Veseys. *Pomeroy* v. *Waitkus,* —— Colo. ——, —— P. 2d —— (1973).

Although the final result in *Waitkus* resulted in a judgment against the Veseys, this was more the result of a procedural technicality in the failure of the Veseys to appeal rather than a renunciation of the reasoning of the Colorado Court of Appeals. Indeed, a reading of the Colorado Supreme Court's opinion indicates no disapproval of the application of the doctrine of collateral estoppel to prevent the relitigation of an issue already fairly decided in a prior lawsuit.

In light of the foregoing, it is obvious that not only the federal courts but the state courts as well are now being increasingly subjected to cases which seek to establish the constitutional boundaries for the offensive use of collateral

estoppel. The liberal approach to the problem is presented by the decisions in *Cauefield, Antonioli* and *Waitkus, supra,* while the conservative approach is exemplified by the Sixth Circuit's decision in *Humphreys.* It is certainly time for the Supreme Court to establish the constitutional framework for the offensive use of the doctrine.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Sixth Circuit.

Respectfully submitted,

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APPENDIX A

Statute

§ 1407. Multidistrict litigation

(a) When civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceedings. Such transfers shall be made by the judicial panel on multidistrict litigation authorized by this section upon its determination that transfers for such proceedings will be for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions. Each action so transferred shall be remanded by the panel at or before the conclusion of such pretrial proceedings to the district from which it was transferred unless it shall have been previously terminated: *Provided, however,* That the panel may separate any claim, cross-claim, counter-claim, or third-party claim and remand any of such claims before the remainder of the action is remanded.

(b) Such coordinated or consolidated pretrial proceedings shall be conducted by a judge or judges to whom such actions are assigned by the judicial panel on multidistrict litigation. For this purpose, upon request of the panel, a circuit judge or a district judge may be designated and assigned temporarily for service in the transferee district by the Chief Justice of the United States or the chief judge of the circuit, as may be required, in accordance with the provisions of chapter 13 of this title. With the consent of the transferee district court, such actions may be assigned by the panel to a judge or judges of such district. The judge or judges to whom such actions are assigned, the members of the judicial panel on multidistrict litigation, and other circuit and district judges designated when needed by the panel may exercise the powers of a district judge in any district for the purpose of conducting pretrial depositions in such coordinated or consolidated pretrial proceedings.

(c) Proceedings for the transfer of an action under this section may be initiated by—

(i) the judicial panel on multidistrict litigation upon its own initiative, or

(ii) motion filed with the panel by a party in any action in which transfer for coordinated or consolidated pretrial proceedings under this section may be appropriate. A copy of such motion shall be filed in the district court in which the moving party's action is pending.

The panel shall give notice to the parties in all actions in which transfers for coordinated or consolidated pretrial proceedings are contemplated, and such notice shall specify the time and place of any hearing to determine whether such transfer shall be made. Orders of the panel to set a hearing and other orders of the panel issued prior to the order either directing or denying transfer shall be filed in the office of the clerk of the district court in which a transfer hearing is to be or has been held. The panel's order of transfer shall be based upon a record of such hearing at which material evidence may be offered by any party to an action pending in any district that would be affected by the proceedings under this section, and shall be supported by findings of fact and conclusions of law based upon such record. Orders of transfer and such other orders as the panel may make thereafter shall be filed in the office of the clerk of the district court of the transferee district and shall be effective when thus filed. The clerk of the transferee district court shall forthwith transmit a certified copy of the panel's order to transfer to the clerk of the district court from which the action is being transferred. An order denying transfer shall be filed in each district wherein there is a case pending in which the motion for transfer has been made.

(d) The judicial panel on multidistrict litigation shall consist of seven circuit and district judges designated from time to time by the Chief Justice of the United States, no two of whom shall be from the same circuit. The concurrence of four members shall be necessary to any action by the panel.

(e) No proceedings for review of any order of the panel may be permitted except by extraordinary writ pursuant to the provisions of title 28, section 1651, United States Code. Petitions for an extraordinary writ to review an order of the panel to set a transfer hearing and other orders of the panel issued prior to the order either directing or denying transfer shall be filed only in the court of appeals having jurisdiction over the district in which a hearing is to be or has been held. Petitions for an extraordinary writ to review an order to transfer or orders subsequent to transfer shall be filed only in the court of appeals having jurisdiction over the transferee district. There shall be no appeal or review of an order of the panel denying a motion to transfer for consolidated or coordinated proceedings.

(f) The panel may prescribe rules for the conduct of its business not inconsistent with Acts of Congress and the Federal Rules of Civil Procedure.

(g) Nothing in this section shall apply to any action in which the United States is a complainant arising under the antitrust laws. "Antitrust laws" as used herein include those acts referred to in the Act of October 15, 1914, as amended (38 Stat. 730; 15 U.S.C. 12), and also include the Act of June 19, 1936 (49 Stat. 1526; 15 U.S.C. 13, 13a, and 13b) and the Act of September 26, 1914, as added March 21, 1938 (52 Stat. 116, 117; 15 U.S.C. 56); but shall not include section 4A of the Act of October 15, 1914, as added July 7, 1955 (69 Stat. 282; 15 U.S.C. 15a).

Added Pub.L. 90—296, § 1, Apr. 29, 1968, 82 Stat. 109.

APPENDIX B

Opinion of the District Court

In re Multidistrict Civil Actions Involving the Air Crash Disaster near Dayton, Ohio, on March 9, 1967.

No. 3834 ML.

United States District Court,
S. D. Ohio, W. D.

Sept. 29, 1972.

Memorandum Opinion and Order

Weinman, Chief Judge.

On March 9, 1967 a DC-9 passenger aircraft owned and operated by Trans World Airlines, Inc. and a Beech Baron aircraft owned and operated by the Tann Company collided in mid-air near Dayton, Ohio. As a result of this air disaster, all occupants of both planes were killed. Numerous civil actions seeking recovery for alleged wrongful death and property damage were filed in this Court, other federal district courts and in various state courts across the country. Six actions pending in other federal district courts were transferred to this Court by the Judicial Panel on Multidistrict Litigation for consolidated and coordinated pretrial proceedings pursuant to Section 1407, Title 28 U.S.C. Among the actions transferred to this Court was a passenger wrongful death action against the Tann Company captioned Humphreys v. Herman Tann, et al. which was originally commenced in the United States District Court for the Eastern District of Michigan, Southern Division.

On July 15, 1970 this Court conducted its first pretrial conference for the purpose of scheduling consolidated discovery with respect to all actions pending before the Court

arising from the mid-air collision. Thomas F. Wolcott, attorney for plaintiff Humphreys in Case No. 3834ML(F) was among the attorneys attending this first pretrial conference. On July 22, 1970 this Court issued a pretrial order which among other things set forth a schedule for the completion of consolidated discovery in these multi-district actions.

In accordance with this Court's first pretrial order consolidated discovery was expeditiously completed in these actions. Counsel for all parties including counsel for plaintiff Humphreys was given a full and ample opportunity to participate in all consolidated discovery proceedings, to ascertain all relevant facts concerning the mid-air disaster near Dayton, Ohio and to frame the issues.

After the completion of consolidated discovery the next pretrial conference was scheduled for December 15, 1970. On November 4, 1970 this Court sent an information order to all attorneys advising them that in view of the completion of discovery all counsel shall make a statement to the Court of what he or they expect to prove and further advising all counsel that the Court was planning an early date for trial and would consider recommendations concerning the joinder of party plaintiffs and whether or not there should be separate trials on liability and damages.

The second pretrial conference was held as scheduled. At this conference Craig Spangenberg, Esq. of the Cleveland, Ohio Bar, an acknowledged specialist in the representation of plaintiffs in air disaster cases delivered a statement of the facts which the passenger plaintiffs would attempt to prove in establishing acts of negligence on the part of both Trans World Airlines and the Tann Company. Plaintiffs' counsel who were present at the pretrial conference concurred in Mr. Spangenberg's statement of facts.

It was further determined at this second pretrial conference that the passenger wrongful death action captioned Downey v. Trans World Airlines, Inc. and Tann Company would be the first case to proceed for trial. No objection was voiced to the trial of the Downey case first.

For some unexplained reason, Thomas Wolcott, attorney for plaintiff Humphreys, who had received notice of the scheduled December 15 pretrial conference and this Court's desire for a statement of facts from all parties failed to attend the second pretrial conference.

From March 22, 1971 to April 7, 1971 the wrongful death action brought by Vera Downey against Trans World Airlines and Tann Company, Civil Action No. 3521ML was tried to a jury in this Court. At the trial plaintiff was represented by attorney Craig Spangenberg of the Cleveland, Ohio Bar, an extremely experienced and highly competent plaintiff's lawyer, who has a reputation among the Bar as a specialist in air disaster cases. Mr. Spangenberg who was thoroughly familiar with all the facts surrounding the mid-air disaster presented to the jury in the Downey case all the claimed acts of negligence which were acknowledged by all the plaintiffs as constituting a basis for a finding of liability on the part of the Tann Company. In addition attorney Daniel J. O'Neill, counsel for Trans World Airlines, an equally qualified and competent trial attorney who also possessed a high degree of expertise in the highly technical area of aviation law, presented evidence and vigorously attempted to persuade the jury that the sole proximate cause of the mid-air collision was the negligence of the Tann Company pilot. After receiving all relevant evidence concerning the liability of Tann Company and hearing vigorous and well reasoned arguments attempting to fix the responsibility for the mid-air disaster upon the Tann Company pilot, the jury returned a general

verdict in favor of the plaintiff in the amount of $300,000 against Trans World Airlines only and found against plaintiff on her claims against the Tann Company. No appeal was filed by any party and upon the satisfaction of the judgment by defendant Trans World Airlines, the judgment in the Downey case became final.

After the judgment in the Downey case became final, a series of motions were filed in the pending Multidistrict cases against the defendant Trans World Airlines seeking to invoke the doctrine of res judicata or collateral estoppel based on the final judgment in the Downey case. In a memorandum opinion issued January 20, 1972 this Court resolved these pending motions with the exception of the motion filed by the Tann Company for summary judgment on the basis of the doctrine of collateral estoppel in all outstanding passenger actions pending against the Tann Company. At that time the outstanding passenger actions were as follows:

Clough v. Tann Company, Civil Action No. 3656ML, Palmer v. Tann Company, Civil Action No. 3834ML(B) and Humphreys v. Tann Company, Civil Action No. 3834ML(F). The Clough and Palmer cases were subsequently settled.

This Court, noting that there is a discernible trend in the law toward the abandonment of the strict requirement of mutuality and privity in the application of the doctrine of collateral estoppel requested the filing of additional briefs on this pending motion and scheduled oral argument following the conclusion of the trial of the federal tort claim actions against the United States arising out of the mid-air disaster. The trial of the tort claims was scheduled for May 2, 1972.

On April 18, 1972 the Tann Company pursuant to this Court's request filed a supplemental brief in support of its

motion. No briefs were filed by the other plaintiffs in the passenger cases against the Tann Company.

On May 2, 1972, prior to the trial of all tort claim actions against the United States, this Court held a settlement conference for all pending cases against the United States and the Tann Company. Attorneys representing plaintiffs in actions brought against the Tann Company in both the state and federal courts participated. As a result of this settlement conference all actions against the United States and all actions against the Tann Company in the state and federal courts were successfully settled with the exception of the cases of Clough v. Tann Company, Case No. 3656ML and Humphreys v. Tann Company et al., Case No. 3834ML (F). Prior to the drafting of this opinion the Court has been advised that the Clough case has settled. Unmistakably the verdict of the jury was the motivating factor leading to the settlement of these actions. The Humpreys' case is the only passenger action that has not been disposed of as a result of the verdict of the jury in the Downey case.

On May 3, 1972, after the federal tort claims actions and the actions against Tann Company were settled, this Court heard oral argument on the pending motion. Counsel for plaintiff Humphreys in Civil Action No. 3834ML(F) was present and presented oral argument.

Plaintiff Humphreys was not a party to the Downey case in which the liability or responsibility of the Tann Company for the mid-air disaster was determined. Thus the pending motion for summary judgment in the passenger cases raises the interesting but difficult question of whether the doctrine of res judicata or collateral estoppel can be applied against a person who was not a party to the prior action.

Prior to reaching the merits of the pending motion, this Court must resolve the preliminary question of what

law governs the collateral estoppel effect of a judgment rendered by this Federal Court in a diversity case. In resolving other motions invoking the doctrine of collateral estoppel filed in other multidistrict cases transferred from the United States District Court for the Eastern District of Michigan, this Court without the benefit of briefs assumed that state law applied. In reliance upon the decision of the Supreme Court in the case of Van Dusen v. Barrack, 376 U.S. 612, 84 S.Ct. 805, 11 L.Ed.2d 945 (1964) this Court concluded that the law of the State of Michigan, where the transferor Court is held, controlled and further reasoned that Michigan conflicts of law rules would direct the application of the law of Ohio where the tort occurred. Since jurisdiction over all these multidistrict cases was based on diversity of citizenship the application of state law seemed to be required by the doctrine of Erie Railroad Co. v. Tompkins, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938) and the "out-come determinative" test set forth in the case of Guaranty Trust Co. of New York v. York, 326 U.S. 99, 65 S.Ct. 1464, 89 L.Ed. 2079 (1945).

After further consideration this Court developed some doubt as to whether state law should govern the force and effect of a prior federal court judgment upon a second action pending in a federal district court. It seemed logical to this Court that countervailing considerations relating to the efficient administration of justice in the federal court system—control over bulging federal court civil dockets and the efficient allocation of judicial time might well dictate the application of a federal rule governing the preclusive effect of prior federal court judgments upon other pending federal court cases involving identical issues. The Court, therefore, inquired during oral argument on the pending motion as to whether federal or state law governed the preclusion or collateral estoppel issue raised herein.

In response to this Court's inquiry, counsel for the defendant Tann Company pointed out that cases decided subsequent to Guaranty Trust Co. of New York v. York, supra have shown a trend away from strict adherence to outcome determinative factors arising under state law in diversity actions where there exists a countervailing federal interest in the administration of the federal judicial system. Byrd v. Blue Ridge Rural Electric Cooperative, Inc., 356 U.S. 525, 78 S.Ct. 893, 2 L.Ed.2d 953 (1958), rehearing denied 357 U.S. 933, 78 S.Ct. 1366, 2 L.Ed.2d 1375 (1958); Hanna v. Plumer, 380 U.S. 460, 85 S.Ct. 1136, 14 L.Ed.2d 8 (1965); Atkins v. Schmutz Manufacturing Co., 435 F.2d 527 (C.A. 4, 1970); and Kern v. Hettinger, 303 F.2d 333, 340 (C.A. 2, 1962). Counsel for the Tann Company further asserts that the policy of the Multidistrict Litigation Act, 28 U.S.C. §§ 1407 et seq. the fact that the accident occurred in airspace under the exclusive sovereignty of the United States of America, 49 U.S.C. § 1508(a) and the fact that the Federal Government alone is charged with the promulgation of rules and regulations relating to the use of air-space, 49 U.S.C. §§ 1303(c) and (e), 1348(a)(b) and (c) strengthen the argument that federal law should be the overriding consideration on the issue of the preclusive effect of a federal court judgment. Learned commentators on the question of issue preclusion or res judicata have advanced the view that in diversity cases the federal interest in the effective administration of the federal court system may militate toward the adoption of a federal rule governing the law of preclusion. Vestal, Res Judicata Preclusion, Chapter 15 (Matthew Bender 1969); Res Judicata in the Federal Courts; Application of Federal or State Law, 51 Cornell Law Quarterly 96 (1965).

For the reasons that follow the Court concludes that the policies underlying the doctrine of issue preclusion or res judicata that is—economy of judicial time and the

need for the termination of legal controversies wherein the same issues have been actually litigated—are so closely integrated with a predominant federal interest in the effective and efficient administration of the federal judicial system that federal law not state law should determine the preclusive effect to be given a federal court judgment in diversity actions upon another federal action involving the same issue.

The holdings of the Byrd and Hanna cases stand for the proposition that a state rule need not be blindly followed in a diversity case where the state rule is not integrally related to state created rights and obligations but relates merely to the form or mode of enforcement and a conflicting federal rule exists supported by a countervailing federal policy which would be disrupted by the application of the state rule. (In Byrd the 7th amendment guarantee of trial by jury and in Hanna the inherent federal power in matters relating to procedure within the federal court system.)

The Erie doctrine obliges federal district courts in diversity actions to apply state substantive law defining the rights and obligations of persons with respect to a state created cause of action. As the Court of Appeals for the Fourth Circuit has stated:

> "The Erie doctrine clearly leaves for determination by the states questions concerning the definition of the basic state-created cause of action, with the federal courts being required to take a position of substantive neutrality. But legal rights are not self-executing, and they can not be viewed in total isolation from the rules governing their judicial enforcement."

Atkins v. Schmutz Manufacturing Company, 435 F.2d 527, 536 (C.A. 4, 1970).

Thus the Erie doctrine clearly mandated that this Court apply in the trial of the Downey case the decisional and statutory law of State of Ohio defining the duty of care owed by Trans World Airlines to its paying passengers, the duty of care owed by the Tann Company to the deceased passengers and the measure of damages in wrongful death actions. Clearly these matters go to the essence of a state created cause of action and pertain to rules of conduct which under Erie must be left to the determination of the forum state. However, once a judgment has been rendered in accordance with the standards of conduct fixed by state law, it does not necessarily follow that the preclusion or res judicata effect of that judgment upon other pending federal actions should be governed by state law. Whereas, the states have a legitimate and predominant interest in defining all rights and obligations arising under a state created cause of action, the question of the preclusive effect of a federal court judgment raises different considerations concerning the economy of judicial time and the avoidance of multiple or needless litigation which are integrally related to the interest of the federal judiciary in the efficient and orderly administration of justice in the federal courts. The states' interest and concern in these matters is at best peripheral and the overriding federal interest in the administration of the federal judicial system compels the adoption of a federal rule.

The Court finds support for this view applying federal rather than state law in the cases of Kern v. Hettinger, 303 F.2d 333 (C.A.2, 1962) and Atkins v. Schmutz Manufacturing Company, 435 F.2d 527 (C.A.4, 1970).

In the Kern case, supra, the Court of Appeals for the Second Circuit was faced with the issue of whether the

effect of a judgment of dismissal for lack of prosecution in a federal district court sitting in California was governed by federal law or the law of the State of California. After the dismissal of the California federal case plaintiff in Kern filed a second action based on the same claim that was asserted in the prior California federal case in the Southern District of New York. Under Rule 41(b) Federal Rules Civil Procedure a dismissal of an action, in the absence of the words "without prejudice" constitutes a dismissal on the merits. The plaintiff urged the adoption of a contrary California rule which provided that a dismissal for lack of prosecution was necessarily a dismissal without prejudice. In holding that federal law applies the Second Circuit stated:

> "One of the strongest policies a court can have is that of determining the scope of its own judgments. Cf. Byrd v. Blue Ridge Rural Electric Cooperative, Inc., 1958, 356 U.S. 525, 78 S.Ct. 893, 2 L.Ed.2d 953. It would be destructive of the basic principles of the Federal Rules of Civil Procedure to say that the effect of a judgment of a federal court was governed by the law of the state where the court sits simply because of source of federal jurisdiction is diversity. The rights and obligations of the parties are fixed by state law. These may be created, modified and enforced by the state acting through its own judicial establishment. But we think it would be strange doctrine to allow a state to nullify the judgments of federal courts constitutionally established and given power also to enforce state created rights. *The Erie doctrine* [Erie R. Co. v. Tompkins, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188], *is not applicable here;* and the judgment in favor of Western Pacific is affirmed. [emphasis added]."

Kern v. Hettinger, etc. et al., 303 F.2d at page 340.

Appendix B—Opinion of the District Court.

In Atkins v. Schmutz Manufacturing Company, supra the Fourth Circuit was faced with the question of whether federal law or Virginia law governed the issue of whether the commencement of a products liability action in a federal district court in Kentucky tolled the Virginia statute of limitations with respect to an identical action commenced in a federal district court in Virgina. The Fourth Circuit recognizing the unitary nature of the federal court system held that the issue presented was essentially procedural and concluded that an overriding federal interest in the effective functioning of federal courts as a cohesive relatively unitary system for the administration of justice dictated that the tolling effect of the pendency of an identical suit in another federal court be determined as a matter of federal law. The Court, applying federal law, concluded that the commencement of an identical suit in another district court tolled the Virginia statute of limitations despite conflicting Virginia decisional law which would have barred the subsequent suit commenced in Virginia.

In reaching this conclusion Chief Judge Haynsworth speaking for the majority made the following pertinent observations:

> "In deciding that the question of the recognition to be given by one federal court to proceedings in another federal court should be resolved as a matter of federal law, we do no violence to the doctrine of Erie Railroad Co. v. Tompkins, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188, which requires that federal courts in the diversity jurisdiction decide cases in accordance with state law, whether decisional or statutory. The contours of that requirement have been delineated with increasing clarity by subsequent cases which

have made it plain that not every issue arising in a diversity case is governed by state law. *See, e. g.*, Guaranty Trust Co. [of New York] v. York, 326 U.S. 99, 65 S.Ct. 1464 [89 L.Ed. 2079]; Byrd v. Blue Ridge Cooperative, 356 U.S. 525, 78 S.Ct. 893, 2 L.Ed.2d 953; Hanna v. Plumer, 380 U.S. 460, 85 S.Ct. 1136, 14 L.Ed.2d 8; Szantay v. Beech Aircraft Corp., 4 Cir., 349 F.2d 60.

"The essence of our Federal system is the allocation of law-making functions between state and national authorities and the decision in *Erie* was, at least in part, a recognition of the fact that this fundamental governmental scheme is seriously undercut if the federal courts, in serving as a forum for the enforcement of state-created rights, formulate their own rules in areas which are properly matters of state, not federal, concern.

"The problem facing the federal courts since *Erie* has been to determine which questions arising in diversity litigation are matters of state concern which should be answered by reference to state law and which questions are matters of federal concern which can be answered by reference to federal law. *Erie* and its progeny may be seen as an attempt to formulate a workable doctrine governing choice of law in diversity actions which would prevent impermissible federal court interference with state rules reflecting policy considerations lying within the realm of state law-making competence. Guaranty Trust Co. [of New York] v. York, 326 U.S. 99, 109, 65 S.Ct. 1464, 89 L.Ed. 2079; Hanna v. Plumer, 380 U.S. 460, 474, 85 S.Ct. 1136, [14 L.Ed.2d 8] (concurring opinion of Mr. Justice Harlan).

". . .

"It is, of course, neither possible nor necessary for

federal courts to be totally neutral in the adjudication of state-created rights. It is not possible simply because federal courts are not protean and are unable to transform themselves into exact replicas of their state counterparts. That state and federal judicial systems are not identic will inevitably mean that the choice of forum will have some effect upon the course of litigation. Some adoption of state court procedures by federal courts sitting in diversity may be feasible, but it may also be in conflict with fundamental interests of the federal courts in the conduct of their own business and the maintenance of the integrity of their own procedures, the legitimate interests of a federal forum, *qua* forum.

"Literal application of some of the language in Guaranty Trust Co. [of New York] v. York, *supra*, might appear to compel the conclusion that a federal court must apply state law in every case where failure to do so might make a difference in the outcome of the litigation. The language of that opinion, however, has been moderated. Now, in the choice between state and federal law in the disposition of procedural problems such as the one before us, we properly take account of federal interests and the effective functioning of the federal courts as a cohesive, relatively unitary, system for the administration of justice."

The above cited cases are not directly controlling on the question before this Court. However, the Court is of the opinion that these cases disclose a trend of authority away from the blind adherence to the "out-come determinative" test of Guaranty Trust and toward the application of federal law in the face of a conflicting state procedural rule, not intimately related to a state created right, where the application of federal law is supported by affirmative countervailing fed-

eral considerations. In this respect the trend of authority is consistent with the modern and progressive view on conflicts of law which mandates the application of the law of the forum which has the most significant relationship to the issue before the Court. See Babcock v. Jackson, 12 N.Y.2d 473, 240 N.Y.S.2d 743, 191 N.E.2d 279 (1963); Auten v. Auten, 308 N.Y. 155, 124 N.E. 2d 99 (1954); Clark v. Clark, 107 N.H. 351, 222 A. 2d 205 (1966).

Where a state-federal conflict pertains to issues concerning the standard of conduct for persons within a state's jurisdiction and the measure of damages in state created wrongful death actions, the state's interest in promulgating rules of conduct and in defining the extent of recovery on state created causes of actions is overriding and requires the application of state statutory or decisional law to these issues. Where, as here, the choice of law question pertains to the res judicata or preclusive effect of a judgment rendered in one federal district court in a diversity action upon an action involving an identical issue filed in another federal district court entirely different considerations are involved. The doctrine of res judicata or issue preclusion is founded upon the policy of terminating needless and endless litigation, avoiding inconsistent judicial decisions on the same set of facts and effectively allocating judicial time. These policy considerations are directly and intimately related to an over-riding federal interest in the effective administration of justice in the federal court system. Furthermore, the issue of the preclusive effect of a federal district court judgment upon an action filed in another district court directly bears upon the internal relationship between components of a single federal judicial system. In order to guarantee the effective functioning of the various federal district courts as components of a unitary system for the administration of justice, the force and effect of a judgment rendered in a federal district court upon an action pending

in other federal district courts should properly be determined under federal law. The Court, therefore, concludes that federal law should govern the preclusion issue raised in the pending motion.

The remaining question to be answered is whether federal law would permit the judgment in the Downey case which exonerated the Tann Company from responsibility for the mid-air disaster to operate as a bar to the relitigation of the issue of Tann Company's responsibility by plaintiff Humphreys who was not a party to the Downey case.

As it originally developed the doctrine of collateral estoppel or issue preclusion barred the parties to a prior action or their privies from relitigating in a subsequent action an issue actually litigated in a prior action in which a final judgment was rendered. 46 Am.Jur.2d Judgments § 415, pp. 415-416. The application of this doctrine was severely restricted by the requirement of mutuality of estoppel. Under the mutuality rule no person is bound in a subsequent suit by a judgment rendered in a prior suit where the adverse party seeking to take the benefit of the prior judgment would not have been prejudiced had the prior action been determined the other way.

Recent years have seen the steady erosion of the mutuality rule in both the state and federal courts. The landmark case supporting the abandonment of the strict requirement of mutuality of estoppel is Bernhard v. Bank of America, 19 Cal.2d 807, 122 P.2d 892 (1942). The so-called Bernhard Doctrine as stated by the California Court is as follows:

> " 'The criteria for determining who may assert a plea of res judicata differ fundamentally from the criteria for determining against whom a plea of res judicata may be asserted. The requirements of due process of law forbid the assertion of a plea of res judicata against a party unless he was bound by the

earlier litigation in which the matter was decided [citing cases]. He is bound by that litigation only if he has been a party thereto or in privity with a party thereto. Ibid. There is no compelling reason, however, for requiring that the party asserting the plea of res judicata must have been a party, or in privity with a party, to the earlier litigation.

" 'No satisfactory rationalization has been advanced for the requirement of mutuality. Just why a party who was not bound by a previous action should be precluded from asserting it as res judicata against a party who was bound by it is difficult to comprehend. See 7 Bentham's Works, Bowring's Ed., 171. Many courts have abandoned the requirement of mutuality and confined the requirement of privity to the party against whom the plea of res judicata is asserted. [Citing cases] The courts of most jurisdictions have in effect accomplished the same results by recognizing a broad exception to the requirements of mutuality and privity, namely, that they are not necessary where the liability of the defendant asserting the plea of res judicata is dependent upon or derived from the liability of one who was exonerated in an earlier suit brought by the same plaintiff upon the same facts. [Citing cases]. The cases justify this exception on the ground that it would be unjust to permit one who has had his day in court to reopen identical issues by merely switching adversaries.

" 'In determining the validity of a plea of res judicata three questions are pertinent: Was the issue decided in the prior adjudication identical with the one presented in the action in question? Was there a final judgment on the merits? Was the party against whom the plea is asserted a party or in privity with a party to the prior adjudication?' "

Subsequent to the Bernhard case a substantial number of federal courts have abandoned the requirement of mutuality and permitted the utilization of the doctrine of collateral estoppel by a stranger to a prior action against a party who has actually litigated an issue in the prior action. People of State of Colorado for Use of Fifield v. Ohio Casualty Ins., Co., 232 F.2d 474 (C.A.10 1956); Davis v. McKinnon & Mooney, 266 F.2d 870 (C.A.6 1959); Gibson v. United States, 211 F.2d 425 (C.A.3 1954); Zdanok v. Glidden Company, Durkee Famous Foods Division, 327 F.2d 944 (C.A.2 1964).

The Bernhard Doctrine abandoning the requirement of strict mutuality is especially applicable to protracted multiple litigation arising from common disasters where the factual and legal issues concerning the liability of defendants are identical. Thus in the case of United States v. United Air Lines, Inc., 216 F.Supp. 709 (D.Nev.1962), aff'd sub nom. United Air Lines, Inc. v. Wiener, 335 F.2d 379 (C.A.9 1964), cert. dismissed 379 U.S. 951, 85 S.Ct. 452, 13 L.Ed.2d 549 (1964) the district court held that a defendant airline company which had thoroughly litigated, in cases brought in the Southern District of California by heirs of passengers, the issue of liability of the airline for the death of passengers in a collision between a passenger plane and a military aircraft was estopped to deny liability to heirs who brought suit in Washington and Nevada arising out of the same air disaster. Accord State of Maryland for Use of Gliedman v. Capital Airlines, Inc. 267 F.Supp. 298 (D.Md.1967). In New York a court has adopted this view holding that a defendant airline would be estopped from denying liability where it had already been adjudged liable by a Texas Court applying Kentucky law. Hart v. American Airlines, Inc., 61 Misc.2d 41, 304 N.Y.S.2d 810.

This Court expressly approves of the holdings in United States v. United Air Lines, Inc. supra, State of Maryland for Use of Gliedman v. Capital Airlines, Inc. supra and Hart v. American Airlines, Inc. supra. Had the jury in the Downey case rendered judgment against the Tann Company this Court on the basis of the judgment in the Downey case would have sustained motions for summary judgment on the issue of liability in favor of plaintiffs in the outstanding passenger cases brought against Tann Company.

Turning to the facts of the present case it is clear that two of the essential elements of the Bernhard Doctrine have been satisfied. A final judgment on the merits has been rendered and the issue of whether the Tann Company pilot was guilty of any act of negligence constituting a proximate cause of the mid-air disaster has been actually litigated. The third essential requirement for the application of the doctrine of collateral estoppel however is lacking—that is—the plaintiff Humphreys against whom the doctrine is invoked has not personally litigated the issue of Tann Company's liability. Thus the Tann Company in its motion asks this Court to carry the Bernhard Doctrine one step further and apply the collateral estoppel doctrine against a stranger to the prior action.

Reasons which are not insubstantial have been advanced for the rule denying the application of collateral estoppel against a stranger. These reasons have been aptly summarized as follows:

> "The rule denying the right to apply the doctrine of res judicata as against strangers to the prior action is based upon obvious principles of justice, fairness, and requirements of due process of law. The reason for the rule lies in the fact that a stranger to an action does not have the opportunity, vouchsafed

> to parties, to prove or ascertain the truth of the questions in issue, and the principle that no man's right should be prejudiced without an opportunity of defending it. Indeed, it is a fundamental doctrine of the law that a party to be affected by a personal judgment must have a day in court and an opportunity to be heard." 46 Am.Jur.2d Judgments § 519, page 671.

The constitutional requirement that each person be afforded his day in court is premised upon the underlying principle that fundamental fairness guaranteed by the due process clause of the Fifth and Fourteenth Amendments dictates that no person shall be deprived of a valuable right or claim without first being afforded the right to appear and be heard.

This Court does not believe that the maxim that each man must be given his day in court is so inexorably fixed that it must mandatorily apply where a careful evaluation of the record of pretrial and trial proceedings in the prior action discloses that the absent party was given full and complete opportunity to ascertain and develop all relevant facts and to frame the issues during discovery and the liability issue was adjudicated at a trial conducted in an atmosphere free from errors in substantive, evidentiary and procedural law or trial strategy which if avoided would have changed the result.

In the limited context of these multidistrict litigation cases the Court does not believe the principles of fundamental fairness guaranteed by due process of law are violated by the application of the doctrine of collateral estoppel against plaintiff Humphreys. The Humphreys case was transferred to this Court by the Judicial Panel on Multidistrict Litigation for coordinated and consolidated pretrial proceedings. Coordinated discovery was conducted at which counsel for plaintiff Humphreys was given the

opportunity to ascertain and develop all relevant facts concerning the cause of the mid-air collision. Under the coordinated discovery proceedings Humphreys' counsel received the added advantage of reaping the benefit of facts developed by other attorneys who specialize in this type of litigation. At subsequent pretrial conferences counsel for Humphreys had the opportunity to participate in the framing of issues for trial and in selecting the first case to be tried. At the trial itself all parties were represented by highly competent attorneys who can accurately be designated as specialists in aviation disaster litigation. All tenable claims of negligence on the part of Tann Company were presented not only by plaintiffs' counsel but by the equally competent counsel for Trans World Airlines who attempted to convince the jury that the sole proximate cause of the mid-air collision was the negligence of the Tann Company pilot. Well reasoned opening statements and closing arguments were presented to the jury. The Court deems it extremely significant that counsel for plaintiff Humphreys, either in his brief or during oral argument, did not assert that learned counsel for plaintiff Downey failed to introduce all relevant evidence, neglected to present all claims of negligence on the part of Tann or otherwise made errors of commission or omission with respect to substantive, procedural or evidentiary law or trial strategy which resulted or contributed to the verdict in favor of Tann Company. No errors on the part of this Court in the admission of evidence or the charge to the jury have been raised. Having had the advantage of presiding at the trial of the Downey case, this Court can truly say that the Downey case was one of the most skillfully tried cases this Court has had the pleasure of adjudicating.

Finally, this is not the type of case where there is an appreciable danger that the jury verdict in favor of the Tann Company was a compromise motivated by sympathy.

The uncontradicted evidence discloses that the deceased passenger Edward Downey was an outstanding individual in terms of his business endeavors and private life. The decedent was a graduate engineer who was selected by his employer for further advancement. The decedent was active in church and civic affairs and at the time of his death left a wife and three minor children. It was obvious that plaintiff's counsel who represented the heirs of other deceased passengers was litigating his most favorable case in an attempt to test the liability and monetary responsibility of both Trans World Airlines and the Tann Company.

Upon considering all these factors the Court concludes that no principle of fundamental fairness inherent in the concept of due process will be offended by the application of the doctrine against plaintiff Humphreys to bar the relitigation of the issue of the Tann Company's liability for the mid-air disaster. In this Court's opinion unfairness will result and the effective administration of justice will be retarded if plaintiff Humphreys is permitted to relitigate an issue which has been fully and fairly adjudicated.

In the context of these multidistrict cases, permitting plaintiff Humphreys to relitigate the issue of Tann Company's liability would sanction a fruitless act which would not effect substantial justice and would be contrary to orderly and efficient judicial administration and repugnant to the purposes of the Multidistrict Litigation Act.

In reaching this conclusion the Court has assumed that federal not Ohio law governed the issue preclusion question raised herein. It must be recognized that the Ohio Supreme Court has declined to abandon the strict requirements of mutuality and privity in the application of the doctrine of res judicata or collateral estoppel. First National Bank of Cincinnati v. Berkshire Life Ins. Co., 176 Ohio St. 395, 199 N.E.2d 863; Whitehead v. General Tele-

phone Co., 20 Ohio St.2d 108, 254 N.E.2d 10. In the Whitehead case the Ohio Supreme Court declined to abandon the strict requirement of privity for the reason a contrary rule "could create grave problems in establishing the adequacy of a nonparty's representation in the prior suit and that the case at bar [was] not one which should result in a departure from present Ohio law."

In this action we are dealing with the question of the res judicata or collateral estoppel effect of a prior federal court judgment in the context of federal common disaster multidistrict litigation. The Ohio Supreme Court has never considered this question and it is unlikely that this issue in the context of federal multidistrict litigation will reach the Ohio Supreme Court.[1] Even assuming that Ohio law applies under the facts of the present case the Court does not find that it is bound by the Ohio cases. Furthermore, this Court believes that were the Ohio Supreme Court to consider the special facts of the present case, wherein it is clear that the issue of Tann Company's liability was truly and fairly tried by expert plaintiff's counsel, the Ohio Supreme Court would regard this action as a proper case for the abandonment of the strict requirements

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[1] It should be noted that in preparing proposed by-laws for the Ohio State-Federal Judicial Council this Court learned that the Delaware State-Federal Judicial Council has unanimously approved in principle the adoption of constitutional or statutory authority for the Supreme Court of Delaware to receive certified questions of Delaware law from the United States District Court for the District of Delaware and the United States Court of Appeals for the Third Circuit under such circumstances as shall be set forth in the rules of these courts.

The adoption of a procedure for the certification of questions of Ohio law to the Supreme Court of Ohio from the United States District Courts for the Northern and Southern Districts of Ohio and the United States Court of Appeals for the Sixth Circuit would seem to be a useful step toward eliminating uncertainty as to the requirements of Ohio law in diversity cases.

of privity and mutuality in the application of the doctrine of res judicata or collateral estoppel.

The Court realizes that this decision does not conform to the weight of authority and appreciates that there is room for reasonable divergence of opinion as to the validity of the result reached herein. However, in view of the great increase in the number of civil actions commenced in the federal district courts in recent years, the Court believes that the federal trial courts should not hesitate to adopt new approaches designed to terminate needless and futile litigation where identical liability issues have been fairly and truly tried in a prior action. Furthermore, the Court believes that this is a proper case in which to test the power of a transferee court in common disaster multidistrict litigation to bar relitigation in subsequent common disaster actions of identical liability issues which have been actually litigated in a prior action arising from the same incident.

Accordingly, the motion of the Tann Company for summary judgment in its favor in the case of Humphreys v. The Tann Company, Civil Action No. 3834(ML)(F) hereby is sustained and this action hereby is dismissed.

Opinion of the Court of Appeals

No. 72-2225

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

APPEAL from the United States District Court
for the Southern District of Ohio.

GEORGE H. HUMPHREYS, Administrator of the Estate of John S. Humphreys, deceased, and GEORGE H. HUMPHREYS, individually,

Plaintiff-Appellant,

v.

HERMAN TANN, DAVID TANN, GEORGE TANN, LEE TANN, ALBERT TANNER and EDNA CHOSID, co-partners d/b/a THE TANN COMPANY, a co-partnership, and THE TANN CORPORATION, a Michigan corporation,

Defendants-Appellees.

Decided and Filed November 21, 1973.

Before: PHILLIPS, Chief Judge, PECK and LIVELY, Circuit Judges.

LIVELY, Circuit Judge. John S. Humphreys, a resident of New York, was killed on March 9, 1967 in a mid-air collision between the Trans World Airlines (TWA) jetliner on which he was a passenger and a smaller Beech Baron aircraft owned by The Tann Company (Tann), a partnership. The collision occurred near Urbana, Ohio as the TWA plane was preparing to land at the Dayton,

Ohio airport. No occupant of either plane survived. Numerous law suits were filed in various state and federal courts. The personal representative of John S. Humphreys sued Tann in the U.S. Distict Court for the Eastern District of Michigan, Southern Division, the place of residence of the partners and the place where the partnership was established and carried on its business. The Tann Corporation, a Michigan corporation, was also made a defendant. The complaint charged Tann with a number of acts of negligence and sought damages "under the common law and the statutes of the State of Ohio." Jurisdiction of the court was based on diversity of citizenship.

By an order dated March 23, 1970, the Judicial Panel on Multidistrict Litigation directed that a number of the actions arising out of the air crash be "transferred to the Southern District of Ohio, Dayton Division, . . . for coordinated or consolidated pretrial proceedings with the related actions now pending in that court." *In re Air Crash Disaster Near Dayton, Ohio,* 310 F. Supp. 798 (1970). The action of Humphreys' representative against Tann was not included in the March 23 order, but was transferred as a tag-along case by an order of July 10, 1970. Thereafter counsel for the Humphreys estate participated in pretrial discovery and conferences among the many attorneys involved in the various actions. Two pretrial conferences were held by the district judge. At the pretrial conference held on December 15, 1970, one case, *Downey* v. *TWA and Tann,* was set for trial on March 22, 1971. This case had been filed originally in the Southern District of Ohio. None of the transferred cases was consolidated with *Downey,* nor was there any agreement that it would serve as a test case.

The trial of the Downey case resulted in a verdict for the plaintiff against TWA only. Judgment was entered

on the verdict dismissing the actions against Tann by the plaintiff and by TWA on its cross-claim. Thereafter Tann filed a motion for summary judgment in the pending case of *Humphreys* v. *Tann* on the ground, "the plaintiffs in the remaining wrongful death actions against Tann are collaterally estopped from proving that the accident in question resulted from any negligence on the part of the Tann Company. . . ." On September 29, 1972 the district court entered an order granting Tann's motion for summary judgment and dismissing the action. *In re Air Crash Disaster Near Dayton, Ohio*, 350 F. Supp. 757 (S.D. Ohio 1972).

On appeal it is first contended that the District Court for the Southern District of Ohio, as transferee court under an order of the Judicial Panel on Multidistrict Litigation, did not have the authority or power to grant summary judgment. The appellant maintains that his case was transferred from the court in Michigan to one in Ohio for the limited purpose of coordinated or consolidated pretrial proceedings, and that when these proceedings were completed the transferee court lost jurisdiction over the transferred case. This argument seeks to put too narrow a construction on the term, "pretrial proceedings." While discovery by deposition, interrogatories and requests for admissions is a part of pretrial proceedings in the typical case, such proceedings are not limited to these activities. Various motions may properly be made as part of pretrial proceedings, including motions for summary judgment. The statute which permits the transfer of a case in multidistrict litigation provides for the remand of the case to the district from which it was transferred, at or before conclusion of pretrial proceedings, "unless it shall have been previously terminated." 28 U.S.C. § 1407. The termination may result from a voluntary dismissal or from action of the court. We adhere to our opinion in *Reidinger*

v. *Trans World Airlines, Inc.*, 463 F.2d 1017 (6th Cir. 1972), that the judge of a transferee court does have the power to hear and decide motions for summary judgment.

Appellant next contends that the district court improperly applied the doctrine of collateral estoppel in concluding that Tann was entitled to summary judgment. It is conceded that the *Humphreys* case was not consolidated with the *Downey* case and that the issue of Tann's liability to the Humphreys estate was not submitted to the jury which found in favor of Tann on the Downey claims. It is argued that since the plaintiff in the transferred *Humphreys* case was not a party to the action between Downey and Tann it would be a denial of due process of law to deny him his day in court on the basis of the outcome of that case. Thus the question is narrowed to whether there is a requirement of mutuality of parties for application of the doctrine of collateral estoppel.

In his Memorandum Opinion, the district judge stressed the fact that the motion was under consideration in the setting of multidistrict litigation and involved the effect of a prior federal court judgment on pending actions arising out of the same common disaster. In this context he concluded that federal law was controlling and that it permitted the application of collateral estoppel or preclusion to prevent relitigation of "an issue which has been fully and fairly adjudicated." The district judge recognized that the courts of Ohio require mutuality of parties for the application of collateral estoppel, but held that there was "an overriding federal interest in the effective administration of justice in the federal court system."

While it is clear that Ohio requires mutuality of parties for application of collateral estoppel, *Whitehead* v. *General Telephone Co.*, 20 O.S. 2d 108, 116, 255 N.E. 2d 628 (1969), it is not clear that there is a body of federal law which

holds that mutuality is not required. The brief of the appellee, while arguing persuasively for application of federal rules, fails to establish the existence of such a body of law by authoritative citations. Much is made of the fact that Congress has enacted pervasive laws concerned with the utilization and control of the national airspace. It is also pointed out that the government was a defendant under the Federal Tort Claims Act in many of the passenger suits arising out of the Dayton collision. Furthermore, the very nature of airplane crashes involving scheduled passenger flights leads to numerous separate actions in different courts. Appellee asserts that when these actions are brought together for coordinated and consolidated pretrial proceedings under the Multidistrict Litigation Act, an orderly administration of the federal judicial system requires that federal law apply to all pretrial rulings. Unless there exists a federal rule of collateral estoppel which is different from that of Ohio, however, it is not necessary to decide which law controls.

The first significant judicial move away from the res judicata requirement of strict mutuality of parties occurred in *Bernhard* v. *Bank of America,* 19 Cal. 2d 807, 122 P. 2d 892 (1942). The California Supreme Court, speaking through Justice Traynor, stated the issue and its determination as follows:

> The criteria for determining who may assert a plea of res judicata differ fundamentally from the criteria for determining against whom a plea of res judicata may be asserted. The requirements of due process of law forbid the assertion of a plea of res judicata against a party unless he was bound by the earlier litigation in which the matter was decided. Coca Cola Co. v. Pepsi-Cola Co., supra [6 W.W.Harr. 124, 36 Del. 124, 172 A. 260]. See cases cited in 24 Am. &

Eng. Encyc., 2d Ed., 731; 15 Cinn.L.Rev. 349, 351; 82 Pa.L.Rev. 871, 872. He is bound by that litigation only if he has been a party thereto or in privity with a party thereto. *Ibid.* There is no compelling reason, however, for requiring that the party asserting the plea of res judicata must have been a party, or in privity with a party, to the earlier litigation.

No satisfactory rationalization has been advanced for the requirement of mutuality. Just why a party who was not bound by a previous action should be precluded from asserting it as res judicata against a party who was bound by it is difficult to comprehend. See 7 Bentham's Works, Bowring's Ed., 171. Many courts have abandoned the requirement of mutuality and confined the requirement of privity to the party against whom the plea of res judicata is asserted. Coca Cola Co. v. Pepsi-Cola Co., supra; Liberty Mutual Ins. Co. v. George Colon & Co., 260 N.Y. 305, 183 N.E. 506; Atkinson v. White, 60 Me. 396; Eagle, etc. Ins. Co. v. Heller, 149 Va. 82, 140 S.E. 314, 57 A.L.R. 490; Jenkins v. Atlantic Coast Line R. Co., 89 S.C. 408, 71 S.E. 1010; United States v. Wexler, D.C., 8 F.2d 880. See Good Health Dairy Products Corp. of Rochester v. Emery, 275 N.Y. 14, 9 N.E.2d 758, 112 A.L.R. 401. The commentators are almost unanimously in accord. 35 Yale L.J. 607; 9 Va.L. Reg. (N.S.) 241; 29 Ill.L.Rev. 93; 18 N.Y.U.L.Q.R. 565, 570; 12 Corn.L.Q. 92. The courts of most jurisdictions have in effect accomplished the same result by recognizing a broad exception to the requirements of mutuality and privity, namely, that they are not necessary where the liability of the defendant asserting the plea of res judicata is dependent upon or derived from the liability of one who was exonerated in an earlier suit brought by the same plaintiff upon the same facts. See cases cited in 35

> Yale L.J. 607, 610; 9 Va.L.Reg. (N.S.) 241, 245-247; 29 Ill.L.Rev. 93, 94; 18 N.Y.U. L.Q.R. 565, 566, 567; 34 C.J. 988, 989. • • • The cases justify this exception on the ground that it would be unjust to permit one who has had his day in court to reopen identical issues by merely switching adversaries. 122 P.2d at 894.

The *Bernhard* opinion speaks of res judicata or "claim preclusion." This court applied the rationale of *Bernhard* to collateral estoppel or "issue preclusion" in *Davis* v. *McKinnon & Mooney,* 266 F.2d 870 (6th Cir. 1959). There a plaintiff who fully litigated an issue against one defendant and lost was precluded from relitigating the same issue against a different defendant. In *Mackris* v. *Murray,* 397 F.2d 74 (6th Cir. 1968), this court applied Michigan law to a case in which the driver of an automobile owned by his employer was killed in a collision with a third party. The employer-owner of the deceased driver's car obtained a judgment for property damages against the other driver. The estate of the deceased driver then sued the other driver and was granted summary judgment in the district court on the ground of collateral estoppel. This court reversed, discussing in detail the difference between the defensive use of collateral estoppel and its affirmative use. The same distinction between defensive and affirmative use of estoppel was noted by the Supreme Court of the United States in *Blonder-Tongue Laboratories, Inc.* v. *University of Illinois Foundation,* 402 U.S. 313 (1971), though it was not the basis of the decision.

In *Zdanok* v. *Glidden Company,* 327 F.2d 944 (2d Cir. 1964), offensive use of collateral estoppel permitted a stranger to the previous litigation to recover in a subsequent action against the unsuccessful defendant in the earlier case. While treating the "offensive-defensive" distinction as a rule of thumb rather than a settled principle of law, the opinion

points out that the case before it concerned a contract rather than factual questions of negligence, and prescribes conditions where abandonment of the mutuality requirement is proper.

In his Memorandum Opinion the district judge expressly adopted the holding in *United States* v. *United Air Lines, Inc.*, 216 F. Supp. 709 (D. Nev. 1962), *aff'd sub nom. United Airlines, Inc.* v. *Weiner*, 335 F.2d 379 (9th Cir.), *cert. denied*, 379 U.S. 951 (1964). That case arose out of a collision between a scheduled airliner and an Air Force plane on a training mission. Actions were filed in the United States District Court for the Southern District of California for the death of 24 passengers in the airliner and were consolidated for trial. The jury verdict held United Air Lines, Inc. liable for the death of its passengers. Thereafter, the District Court for Nevada granted summary judgment against United Air Lines in favor of the representatives of seven passengers whose cases had not been consolidated with the original 24 in the Southern District of California. In its opinion the district court stated:

> While it is true that the general rule requires that there be identity of parties to invoke the doctrine of *res judicata*, nevertheless, the Courts, increasingly so in the last 20 years, have not adhered to that doctrine, and have held that no constitutional right is violated where *the thing to be litigated was actually litigated in a previous suit, final judgment entered, and the party against whom the doctrine is to be invoked had full opportunity to litigate the matter and did actually litigate it.*
>
> The rule of non-mutuality is not a general one but a limited one to be determined from the facts and circumstances in each case whether or not it should be applied. 216 F. Supp. 709, 725-726.

Appellees have cited *Antonioli* v. *Lehigh Coal & Navigation Co.*, 451 F.2d 1171 (3rd Cir. 1971), *cert. denied*, 406 U.S. 906 (1972), as a case "wherein parties to the second action who had not been parties to the prior action were barred from relitigating identical issues." This statement is not supported by the opinion, which holds that there was a substantial identity of parties in the two actions and that the same parties complained of substantially the same wrong. The case was decided on principles of res judicata, with no issue of mutuality of parties being considered. The only case noted by appellees, or discovered through independent research, in which a previous judgment was held to estop a plaintiff who was not a party to the previous action is *Cauefield* v. *Fidelity & Casualty Company of New York*, 378 F.2d 876 (5th Cir.), *cert. denied*, 389 U.S. 1009 (1967). In that case the court applied Louisiana law and concluded, ". . . that presented with the unusual facts of the case before us, the Louisiana courts also would find the appellants are estopped by the state court judgment in order to preclude relitigation of the desecration issue." 378 F.2d at 879. The facts in the case were most unusual in that the plaintiffs in the second action had testified in the trial of the first one to the very facts which would necessarily have been the basis of any recovery by them in the second trial. The jury in the first trial rejected this testimony and found for defendants. Both sets of plaintiffs were represented by the same attorneys; the second set of plaintiffs actively participated as witnesses in the first trial. Further, the Fifth Circuit's holding is an application of Louisiana law expressly confined to the unusual facts of that case. Its reasoning is not regarded as controlling in the present case.

The facts in the present case are quite different from those in *Cauefield, supra*. The administrator of the estate of John S. Humphreys chose an attorney to press his claim and the administratrix of the estate of Edward F. Downey

chose a different attorney. They employed different strategies from the beginning. The Downey estate sued TWA and Tann jointly, whereas the Humphreys estate sued them separately in different jurisdictions. While the attorney for the Humphreys estate participated in coordinated pretrial activities under the multidistrict litigation order, the cases were never consolidated for trial and no agreement was made that the outcome of *Downey* would conclude the issues in other transferred cases. At the pretrial conference held by the transferee judge on December 15, 1970, the Downey case was set for trial. There was discussion of the procedure to be followed with respect to the other cases. The court indicated that it would try the cases which had originated in its jurisdiction and that the rest would be returned to the place where they were filed. When an attorney for the government stated that he did not expect to be bound by the testimony at the Downey trial, the court assured him that he would not be so bound since he was not a party to it. There is nothing in the proceedings to indicate an intention, or agreement, that persons not joined as plaintiffs in the Downey trial would be bound by its outcome.

While the doctrine of collateral estoppel permits a prior judgment to preclude relitigation of an issue previously determined on its merits, it may be applied *in favor of* a stranger to the first action, but only *against* a party to that action. This has been true from the beginning of the judicial development of the theory of collateral estoppel. In *Bernhard* v. *Bank of America, supra,* it was stated that three questions are determinative of the issue and that all must be answered affirmatively. The third question, "Was the party against whom the plea is asserted a party or in privity with a party to the prior adjudication?" must be answered in the negative in this case. Humphreys' administrator is not bound, under this classic test of preclusion,

by the verdict in the *Downey* case. Writing for a unanimous Supreme Court in *Blonder-Tongue* v. *University of Illinois Foundation, supra,* Justice White stated the rule as follows:

> Some litigants—those who never appeared in a prior action—may not be collaterally estopped without litigating the issue. They have never had a chance to present their evidence and arguments on the claim. Due process prohibits estopping them despite one or more existing adjudications of the identical issue which stand squarely against their position. 402 U.S. at 329.

We share the concern of the district court for the crowded dockets of federal courts and the proper utilization of judicial time. However, we do not believe that these considerations can overcome the due process objection which was raised by the appellant as his first response to appellee's motion for summary judgment and which he has relied upon continuously.

The judgment of the district court is reversed. The cause is remanded to the district court for return to the United States District Court for the Eastern District of Michigan in accordance with the procedures of the Judicial Panel on Multidistrict Litigation. Costs will be taxed to the appellees.

Judgment of the Court of Appeals.

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 72-2225

GEORGE H. HUMPHREYS, Administrator of the Estate of JOHN S. HUMPHREYS, Deceased, and GEORGE HUMPHREYS, Individually,

Plaintiffs-Appellants,

vs.

HERMAN TANN, Individually and d/b/a THE TANN COMPANY, a co-partnership, and THE TANN CORPORATION, a Michigan Corporation,

Defendants-Appellees.

Before: PHILLIPS, Chief Judge,
PECK and LIVELY, Circuit Judges.

JUDGMENT

APPEAL from the United States District Court for the Southern District of Ohio.

THIS CAUSE came on to be heard on the record from the United States District Court for the Southern District of Ohio and was submitted on briefs without oral argument.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby reversed. The cause is remanded to the District Court for return to

the United States District Court for the Eastern District of Michigan in accordance with the procedures of the Judicial Panel on Multidistrict Litigation.

Costs will be taxed to the appellees.

ENTERED BY ORDER OF THE COURT

JAMES A. HIGGINS
Clerk

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1973

No. 73-1250

HERMAN TANN, DAVID TANN, GEORGE TANN, LEE TANN, ALBERT TANNER and EDNA CHOSID, co-partners d/b/a THE TANN COMPANY, a co-partnership, and THE TANN COMPANY, a Michigan corporation,
Petitioners,

vs.

GEORGE H. HUMPHREYS, Administrator of the Estate of John S. Humphreys, deceased, and GEORGE H. HUMPHREYS, individually,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

QUESTIONS PRESENTED

1. As unanimously found by the Court of Appeals below in reversing the district court: Where (a) the plaintiff-respondent, Humphreys, was not a party to, nor directly or indirectly participated in the action or trial of *Downey v. TWA and Tann,* nor privity

with any party thereto; and (b) was represented by separate counsel acting independently and pursuing a separate course and theory; and (c) there is no separate or different Federal Rule of Collateral Estoppel; and (d) dismissal by the district court of the Humphreys action herein on the ground of collateral estoppel constituted a denial of due process of law, and was erroneously based upon the verdict of the jury in the Downey action in finding in favor of Downey against TWA (the prime target), and dismissing Downey's claim against Tann, *Whether* the decision of the Court of Appeals below was error in reversing the district court?

2. Whether the Petition meets the requirements of Rule 19 of the Rules of this Court?

Note: As would appear from the above, and as hereinafter demonstrated, the decision of the Sixth Circuit is fully in accord with the various decisions of both the State and Federal courts that collateral estoppel will not be applied against a stranger or where it would constitute a violation of due process. It is respectfully submitted that the so-called "Questions Presented" by the Petitioner are spurious, that there are no genuine issues requiring the intervention of this court. As to number 1, there is no separate so-called "Federal Rule of Collateral Estoppel", involved here, and if such a separate rule existed, it necessarily would be the same in principle as the state rules and it would not change the basic due process requirement. As to number 2, the assumptions of fact are misstatements not in accord with the record nor

with the findings of the Sixth Circuit, and in any event are immaterial, since they cannot be substituted for the requirements of due process or the mandatory elements of collateral estoppel.

RESPONDENT'S STATEMENT OF THE CASE*

This is a diversity action for damages for wrongful death on behalf of the widow and two infant children of John Humphreys, who was killed while he was a passenger on a TWA DC-9 aircraft on a descent to land at Dayton, Ohio, when it was struck in mid-air by a Beach Baron light aircraft owned and operated by the defendants-Petitioners, Tann Company, et al. (Tann). The complaint, alleging claims based upon the laws and statutes of Ohio, the situs of the crash and death, demanded a trial by jury. (A. 160).

It was filed in the U.S. District Court in Detroit, Michigan, solely against Tann by the father of the decedent in his individual and representative capacity as administrator, C.T.A. of the decedent's estate. After issue was joined the action was temporarily transferred to the U.S. District Court in Dayton as a "tag-along action" in connection with Multidistrict discovery proceedings being conducted by District Judge Carl A. Weinman, to whom passenger actions from different parts of the country variously pending against TWA, Tann and the U.S.A. had also been transferred for "the purpose of coordinated or con-

*Substantially as found by the Court of Appeals below.

solidated pretrial proceedings as provided in the order of the Multidistrict panel." 310 F. Supp. 798. Joint discovery proceedings involving these actions by way of depositions of the defendants, and third party witnesses were thereafter conducted, principally in Dayton, in which Humphreys' counsel participated only for the purposes of discovery. After the depositions had been completed, one of the cases, *Downey v. TWA and Tann*, pending locally in the U.S. District Court in Dayton, was tried in that Court before a jury, Weinman, D. J. presiding. A jury verdict was duly returned in favor of the plaintiff, Downey against TWA, but dismissing as to co-defendant, Tann. At no time did the plaintiff herein or his sole attorney, the undersigned, directly or indirectly, become a party to, nor participate, nor agree to be bound by, nor be represented in the Downey trial or in the pre-trial conference relating thereto, nor does the record show anything to the contrary. No order of transfer of Humphreys from Detroit to Dayton for other than Multidistrict pretrial purposes, or for consolidation for trial with Downey, was ever made or issued herein. Nor was it ever agreed that *Downey* be a test case.

Nevertheless, sometime after the *Downey* trial and verdict, the attorneys for Tann moved before the Multidistrict Judge for Summary Judgment dismissing the Humphreys' complaint on the ground that Humphreys was collaterally estopped by reason of the jury's verdict in favor of Tann in the Downey case. The motion was vigorously opposed by Hum-

phreys' counsel by way of filed brief and oral argument. The district court below granted the motion notwithstanding an admission in its thirty-three page opinion that its "decision does not conform to the weight of authority" and its failure to cite a single supporting authority. (A. 35).

Note: Petitioner's statement of the case is replete with inaccuracies and unfounded innuendos, all unsupported by the record and in contradiction of the findings of the Court of Appeals. The fact is that the *Downey* action was tried alone by District Judge Weinman because it was the only locally pending action and the only one of which Judge Weinman had trial jurisdiction as he stated, after he refused to join outside suits into the *Downey* trial for that reason (A. 67, 64, 113, 116, 119) saying that only *Downey* would be bound (A. 117). See also opinion of Court of Appeals. (p. 671.)

It is respectfully submitted that Petitioners' reference to prior partial recoveries from TWA or the U.S.A. is improper and obviously made for prejudicial purposes. Respondent is constrained to say that he is prepared to prove damages substantially in excess of the amounts separately settled for.

THE DECISION OF THE COURT OF APPEALS

The Court of Appeals (487 F.2d 666) in unanimously reversing Judge Weinman found:

1. That Humphreys was transferred from Detroit for Multidistrict discovery proceedings only, was not

consolidated with Downey, nor was there any agreement that it serve as a test case. (p. 667).

2. That the issue of Tann's liability to Humphreys was not submitted to the Downey jury. (p. 668).

3. That there is no evidence of the existence of a separate body of federal law of collateral estoppel nor that it is different from the law of Ohio. (p. 688).

4. That the district court stated it would only try the cases originating in its jurisdiction and return the rest to the courts of their origin; that no cases other than the Downey plaintiffs would be bound by the outcome of the Downey trial. (p. 671).

5. That the doctrine of collateral estoppel may be applied only against a party to the prior judgment, or a privity to such party, citing among other authorities, the recent decision of this court in *Blonder-Tongue v. University of Illinois Foundations,* 402 U.S. 313, 329, where the rule was explicitly restated by Justice White. Humphreys was neither a party nor a privity.

6. That the concern of the district court to summarily dispose of cases and relieve the dockets of the federal courts cannot overcome the due process requirements which were violated by the district court. (p. 672).

THE DECISION OF THE DISTRICT COURT

The thirty-three page opinion of the district court reported at 350 F.Supp. 757, was primarily concerned with an elaborate attempt to erect a facade (unsup-

ported by and in fact contradicted by the record) of fair dealing in order to obscure and overcome the plain requirements of due process of law. Despite it misplaced zeal to accomplish a disposition of the last of the Multidistrict cases before it, it was obliged to admit its dismissal of the Humphreys case had no basis in law when it finally summed up its 33 page argument:

> "The Court realizes that this decision does not conform to the weight of authority and appreciates that there is room for reasonable divergence of opinion as to the validity of the result reached herein." (p. 768).

The essence of the district court's curious attitude was before illustrated when, apparently recognizing the legal obstacles to throwing the plaintiffs out of court, it frankly admitted to Humphreys counsel during the oral argument: "*If I can find a way to do it, I am going to do it.*" (Emphasis added) (A. 156).

REASONS FOR DENYING THE WRIT

I

THE PETITIONERS' MAIN POINT IS THAT THEY WERE DISSATISFIED WITH THE LAW AS UNIVERSALLY ACCEPTED AND WITH THE CONSTITUTIONAL SAFEGUARD OF DUE PROCESS AND THE RIGHT TO TRIAL BY JURY AS APPLIED TO HUMPHREYS.

Apart from arguing for a change in American basic legal principles and for a change in our constitution, the petition presents no legal authority to justify its entertainment. If there is any deficiency in the Multidistrict Act as claimed by Petitioners, then the rem-

edy, if called for, may be supplied only by congress within constitutional limitations. Petitioners' real complaint is not that the law has been misapplied by the Court of Appeals, but that the law should be changed. Its discussion of class actions is similarly immaterial. There is no class action here involved.

II

THERE IS NO CONFLICT OF OPINION AMONG THE CIRCUIT COURTS OF APPEALS ON THE BASIC REQUIREMENTS OF THE COLLATERAL ESTOPPEL DOCTRINE. THIS COURT HAS CLEARLY STATED THE RULE.

None of the cases cited by the Petitioners under Point 2 of their brief in any way depart from this basic principle, they are neither in conflict with each other nor with the court below on this point. The *Kern* case, notwithstanding the selective quotation at p. 16, was concerned with the Federal Rules of Civil Procedure, which are not in issue here. The opinion of the Court of Appeals herein more than adequately disposes of the cases cited by the Petitioners. It stated its position as in agreement with the recent succinct summary of the law by this Court in the *Blonder-Tongue* case:

> "Some litigants—those who never appeared in a prior action—may not be collaterally estopped without litigating the issue. They have never had a chance to present their evidence and arguments on the claim. Due process prohibits estopping them despite one or more existing adjudications of the identical issue which stand squarely against

their position. (Citing cases)". (402 U.S. 313, 329).

See also *Rachal v. Hill,* 435 F.2d 59 (C.A. 5, 1970).

III

PETITIONERS HAVE FAILED TO CITE ANY ADDITIONAL GROUNDS

Petitioners have taken a wide scatter gun approach even resorting to inaccuracies. The transcript of the Downey trial is not a part of the record herein, as asserted by Petitioners at p. 6, nor was a copy ever served on Humphreys' counsel who has never seen it. Nor was it incumbent upon Humphreys' counsel to assume the burden of obtaining a copy of that costly transcript, analyzing it and showing how he would proceed with his own trial. As the Court of Appeals below observed. Humphreys' attorney proceeded on a different course. Humphreys' attorney did not take part in the Downey trial. He had no voice in the selections for use at trial from the voluminous depositions, transcripts and documentary evidence, nor in the selection and preparation of expert witnesses. He did not cross-examine witnesses. He made no arguments to the jury. This Court knows that jury trials oftentimes result in verdicts achieved as a result of the skill, strategy and advocacy of individual trial counsel. The Humphreys trial would have Tann as its only target. Whereas in Downey there were two co-defendants, with TWA as the natural target and Tann there for insurance. See *Healey v. American*

Airlines, (U.S.D.C.E.D. Ky., Swinford, D.J., April 1, 1970) in which this point was specifically recognized and collateral estoppel denied.

It should be noted that the *Waitkus* case, extensively discussed and relied upon by the Petitioners, pages 20-23, was reversed by the Supreme Court of Colorado, *Pomeroy v. Waitkus,* 517 P.2d 396, saying at p. 400, after citing the *Blonder-Tongue* case:

> "In our view, Pomeroy did not have his day in court when the trial court applied the doctrine of collateral estoppel in the first trial. And we agree with the statement of Chief Judge Silverstein in his dissenting opinion that although the policy of limiting litigation is sound, it should not be applied so as to deprive a party of procedural due process—the right of a full and fair opportunity to litigate the ultimate issue in the case—here, that of liability. *Waitkus v. Pomeroy,* supra."

CONCLUSION

There are no issues requiring this Court's attention. Wherefor it is respectfully submitted that the Petition for a Writ of Certiorari be denied with costs.

Respectfully submitted,

THEODORE E. WOLCOTT,

Attorney for Respondent.

March 26, 1974.